

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 28 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

SULTAN WARRIS KHAN,

Defendant - Appellee.

No. 05-50468

D.C. No. CR-02-00951-FMC-01

MEMORANDUM^{*}

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

ASIF MOHAMMAD KHAN,

Defendant - Appellee.

No. 05-50472

D.C. No. CR-02-00951-FMC-02

Appeal from the United States District Court
for the Central District of California
Florence Marie Cooper, District Judge, Presiding

Argued and Submitted July 24, 2006
Pasadena, California

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: FERNANDEZ, RYMER, and CLIFTON, Circuit Judges.

The United States appeals the sentences imposed upon Sultan Warris Khan and Asif Mohammad Khan following their conviction by guilty plea to conspiracy, filing false quarterly reports with the Securities and Exchange Commission, wire fraud and deprivation of honest services, money laundering conspiracy, and concealment money laundering.¹ The government challenges the district court's imposition of sentences of twenty-four months imprisonment and fines in lieu of restitution. We review for reasonableness, *United States v. Booker*, 543 U.S. 220, 264 (2005); *United States v. Plouffe*, 445 F.3d 1126, 1131 (9th Cir. 2006) (as amended), and affirm in part and remand in part.

The government argues that the district court failed to give sufficient weight to the Sentencing Guidelines. However, the court properly calculated a Guidelines range and used the range as a starting point. As we have subsequently indicated, the Guidelines are not entitled to greater weight than the other 18 U.S.C. § 3553(a) factors. *United States v. Zavala*, 443 F.3d 1165, 1171 (9th Cir. 2006) (per curiam). The district court gave reasons for arriving at its sentence based on lack of criminal history, advanced age, and poor health. There is some evidence to support each.

¹ Asif additionally pled guilty to falsification of accounting books and records.

Whether or not we would have done the same thing, the court acted within its discretion in considering these factors to fashion a reasonable sentence. 18 U.S.C. § 3553(a); *United States v. Menyweather*, 447 F.3d 625, 634-35 (9th Cir. 2006) (as amended).

The government argues that withdrawal of our opinion in *United States v. Butler*, 389 F.3d 956 (9th Cir. 2004), *withdrawn by* 406 F.3d 1173 (2005), further evidences the unreasonableness of the sentence. But the district court properly based its Guidelines calculation on the law as it was at the time, and determined its ultimate sentence considering the Guidelines *and* the § 3553(a) factors. *See Menyweather*, 447 F.3d at 634-35.

Although the sentencing judge was in the best position to determine whether “complex issues of fact related to the cause or amount of the victim’s losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process,” 18 U.S.C. § 3663A(c)(3)(B), it is unclear to us that the court actually made such a determination with respect to NewCom and Actrade. The Khans’ plea agreements appear to acknowledge losses to each of “at least \$1.1 million,” and the district court separately ordered a co-conspirator to pay restitution to these two entities jointly and severally with the Khans. In these circumstances, we are unable to say

whether there was clear error or not. Therefore, we remand for the court to make an explicit determination with respect to restitution to NewCom and Actrade.

AFFIRMED IN PART; REMANDED IN PART.